STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2004
v	No. 242745 Midland Circuit Court
SHAD JEREMY LAFLURE, Defendant-Appellant.	LC No. 01-009989-FH

Before: Jansen, P.J. and Markey and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of fourth-degree fleeing and eluding, MCL 257.602a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to thirty months to fifteen years' of imprisonment.

On the evening of August 1, 2002, the Midland County Sheriff's Department was called to the home of Melissa Adams, defendant's ex-wife. Adams had complained that her phone line had been cut, and that she believed that defendant was responsible. Adams told Deputy Sheriff Brandon Charbonneau and Marine Deputy Norm Labonte where defendant lived and informed them that defendant drove a green motorcycle.

As the two deputies approached defendant's residence in their marked patrol car, Labonte noticed defendant pulling out of the driveway on a motorcycle. Labonte recognized defendant, who was wearing an open-faced helmet, because the two used to work together. When Charbonneau turned on the patrol car's lights and siren, defendant sped away. Charbonneau and Labonte followed defendant trying to close the distance between their vehicle and defendant's motorcycle. However, after several minutes, during which the officers reached speeds in excess of 115 mph, the officers abandoned the pursuit. Defendant was later arrested at his residence. While a number of police officers searched the area around the residence for the motorcycle, it was never recovered.

Defendant first argues that he was denied a fair trial by remarks made by the prosecutor during his rebuttal closing argument about defendant's decision not to testify. We disagree. Defendant did not raise a timely and specific objection to the comments challenged on appeal, nor did he request a curative instruction and, therefore, the issue has not been preserved. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Unpreserved assertions of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v*

Rodriguez, 251 Mich App 10, 32; 650 NW2d 96 (2002). "Reversal . . . is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003) (footnote omitted).

A "prosecutor may not comment upon a defendant's failure to testify." *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). However, it is clear that the challenged remarks were made in response to an issue raised by defense counsel during closing argument. Specifically, defense counsel stated, "I'm not suggesting that this person or whoever it was either hid the motorcycle somewhere else or took off with it, because I'm somewhat handicapped in this case because my client contends he wasn't the one driving." In response, the prosecutor observed that defendant did not contend "a single thing here. You didn't hear him at the stand testify under oath and tell you anything." Because the prosecutor's remarks came in response to an assertion made by defense counsel, no error, plain or otherwise, occurred. *Callon*, *supra* at 330 (observing that "otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense").

Defendant next argues that the trial court abused its discretion by allowing: (1) three law enforcement officers to testify about prior contacts with defendant, (2) Adams to testify about why she called the police that night, and (3) Charbonneau to testify that the police were investigating a possible "bond violation" when they went to defendant's residence. However, defendant waived appellate review of these evidentiary matters by agreeing to the introduction of this evidence. "When a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal." *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

In any event, the testimony complained of was not erroneously admitted. Adams testified that she called the police that night because she thought defendant might have cut her telephone lines. Labonte testified that he and defendant had worked together for five or six months. Midland County Deputy Sheriff Brent Benzing testified that he "had had limited contact" with defendant before August 1, 2001. Sergeant Greg Hall was asked whether he knew defendant before August 2001, to which the officer simply replied, "Yes." Charbonneau was asked whether he had met defendant before August 1, 2001, and the officer replied, "Yes, I have." Charbonneau also testified that his interest in defendant that evening was born of Adams' suspicions "and a bond violation."

We see no error in the admission of these statements. The officers' testimony regarding prior contact with defendant was brief, and simply acknowledged the existence of prior contacts. Identification was in issue at trial, and was the basis of defendant's defense. The officers' testimony was relevant to the officers' ability to identify defendant as the individual who was fleeing on the motorcycle, and who was subsequently arrested. Further, the nature of the prior contacts was not specified, except in the instance of Labonte, and that testimony was clearly benign.

As for Adams' testimony and Charbonneau's testimony regarding a bond violation, this evidence was relevant to the res gestae of the crime. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). This evidence established why the officers were looking for defendant, and,

thus, was relevant to the issue of whether the officers were performing their lawful duties when they approached defendant and attempted to stop him. MCL 257.602a(1).

Finally, we reject defendant's argument that he was denied the effective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843, 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant's argument is predicated on the assertion that the prosecutor committed misconduct when referring to defendant's failure to testify, and that the admission of the testimony outlined above was in error. However, no error occurred in either of these instances. Defense counsel cannot be deemed ineffective for failing to raise meritless objections. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Regardless, even if there were error it was harmless and did not change the result of the proceedings.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage